

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL & TOBACCO COMMISSION**

**IN THE MATTER OF  
THE PERMIT OF:**

**GASAMERICA SERVICES, INC.  
100 EAST U.S. 6  
LIGONIER, INDIANA 46767**

**Applicant.**

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**PERMIT NO. DL57-23122**

**PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

GasAmerica Services, Inc. ("Applicant"), 100 East U.S. 6, Ligonier, Indiana 46767, permit number DL57-23122, through counsel Brian J. Tuohy, is the Applicant for a new Type 115<sup>1</sup> Alcohol and Tobacco Commission ("ATC" or "Commission") beer and wine permit. The application was assigned to the Alcoholic Beverage Board of Noble County ("Local Board"). The Local Board held a hearing on February 12, 2008 ("LB Hearing") and its vote resulted in a tie: two (2) members voted in favor of, and two (2) members voted in opposition to, the application. The ATC decided that the Applicant failed to obtain approval by a majority of the LB members and thus denied the application on February 19, 2008 at its regular public meeting.

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge U-Jung Choe ("Hearing Judge"). An appeal hearing was held on April 29, 2008 ("Appeal Hearing") and at that time, witnesses were sworn, evidence was received and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the LB Hearing, the evidence submitted to the ATC during the Appeal Hearing, and the contents of the entire ATC file, as well as having taken official notice of the codes and standards adopted by this

state, now tenders her Findings of Fact and Conclusions of Law to the Commission for its consideration.

## **II. PROCEDURAL HISTORY**

1. On March 6, 2007, GasAmerica filed its Application for a New or Transfer Permit.
2. On May 10, 2007, the Local Board held a hearing and voted three (3) to zero (0) to deny the application.
3. On May 18, 2007, the ATC adopted the Local Board's recommendation.
4. On May 30, 2007, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.
5. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.
6. On September 19, 2007, the Hearing Judge conducted a hearing regarding the Applicant's appeal.
7. On October 25, 2007, the Hearing Judge issued an Order Remanding Case to Local Board for Rehearing and Further Investigation for the limited purpose of allowing the Local Board to explore the issue of need and desire in the community.
8. On February 12, 2008, the Local Board held a hearing and its vote resulted in a tie: two (2) members voted in favor of, and two (2) members voted in opposition to, the application.
9. On February 19, 2008, the ATC denied the application.
10. On March 6, 2008, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.

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<sup>1</sup> Beer and wine (grocery) dealer located in an incorporated area. Ind. Code 7.1-3-5-2(a).

11. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.
12. On April 29, 2008, the Hearing Judge conducted a hearing regarding the Applicant's appeal.

### **III. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
  1. Dennis Spegal, Vice President of GasAmerica
  2. Greg Dietrich, District Manager (Northern Indiana) of GasAmerica
  3. Brian Tuohy, Attorney for GasAmerica
- B. The following individuals testified before the Local Board against the Applicant in this cause:
  1. (inaudible), Remonstrator
  2. Gary Donnelly, Remonstrator
- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
  1. Affidavit of Stephanie White, with state-wide survey attached (Exhibit 1)
  2. Affidavit of Stephanie White, with area-specific survey attached (Exhibit 2)
- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:
  1. Petition with names and addresses of those opposed to another alcohol permit

### **IV. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
  1. Dennis Spegal, Vice President of GasAmerica
  2. Brian Tuohy, Attorney for GasAmerica

- B. The following individuals testified before the Commission against the Applicant in this cause:
1. Janet Stork, Remonstrator
- C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:
1. Summary of Evidence In Support of the Desire of the Neighborhood or the Community to Receive Such Services (Exhibit 1)
  2. Summary of Evidence In Support of the Need for Services at the Location of the Permit (Exhibit 2)
  3. Affidavit of Stephanie White, President of GasAmerica, with the Store Manager's Affidavit of Jennifer Weldy regarding specific requests by customers who shop at the Ligonier store for sales of beer and wine (Exhibit 3)
  4. Summary of Evidence Showing Remonstrators' Objections to the Issuance of the Permit are Speculative and Ambiguous, and the Local Board's Decision was Arbitrary (Exhibit 4)
- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:
1. TRIP Inspection Report showing tobacco violations

## **V. FINDINGS OF FACT**

1. GasAmerica, located at 100 East U.S. 6, Ligonier, Indiana 46767, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL57-23122. (ATC File).
2. GasAmerica, an Indiana based company headquartered in 2700 West Main Street, Greenfield, Indiana, has existed for approximately twenty-five (25) years, being incorporated in the State of Indiana in 1983. (ATC file).
3. GasAmerica is in good standing with the Indiana Secretary of State. (ATC File).

4. The letters G, A and S in the word GasAmerica stand for “Grocery And Services”. GasAmerica’s stated business purpose is to sell groceries and gasoline in a convenient manner. (Appeal Hearing, ATC File).

5. GasAmerica operates ninety (90) convenience stores: seventy-six (76) in Indiana and fourteen (14) in Ohio. (Appeal Hearing).

6. Of the ninety (90) convenience stores, GasAmerica has ATC permits to sell beer and wine in sixty-three (63) of these stores: forty-nine (49) stores in Indiana and fourteen (14) stores in Ohio. (Appeal Hearing).

7. GasAmerica's store at 100 East U.S. 6, Ligonier, Indiana (“Ligonier store”), has been in operation for more than seven (7) years. (Appeal Hearing, ATC File).

8. The Ligonier store is typical of other GasAmerica stores throughout Indiana. (Appeal Hearing).

9. The Ligonier store is not located within two hundred feet (200’) of a school or church. (LB Hearing, Appeal Hearing, ATC File).

10. At the Ligonier store, GasAmerica sells thousands of different products which are typically sold in Indiana grocery stores, including but not limited to: dairy products, milk, cheese, eggs, meat and prepared food products, fresh fruit, canned goods, and tobacco products. (Appeal Hearing).

11. The Ligonier store sells the same or similar type of grocery products found at other stores that sell grocery products. (Appeal Hearing).

12. The Ligonier store is a similar store and operation to other nearby GasAmerica stores in neighbor counties that hold beer and wine permits, specifically the GasAmerica stores located in Angola and Auburn, Indiana. (Appeal Hearing).

13. The customers that shop in the GasAmerica stores located in Angola and Auburn also shop in the GasAmerica store located in Ligonier. (Appeal Hearing).

14. Many customers that purchase beer and wine in the GasAmerica stores located in Angola and Auburn have asked to purchase beer and wine in the GasAmerica store located in Ligonier. (LB Hearing, Appeal Hearing).

15. There are often specific requests by GasAmerica's customers in the Ligonier store for the sale of beer and wine. (LB Hearing, Appeal Hearing).

16. GasAmerica conducted a state-wide survey of its customers. This survey generated One Thousand Seven Hundred and Forty-Eight (1,748) responses. Of these responses, about one-third ( $1/3^{\text{rd}}$ ) of the customers (specifically, twenty-nine percent (29%)) expressed a desire that GasAmerica sell beer and wine. (LB Hearing, Appeal Hearing).

17. GasAmerica conducted a second survey limited specifically to its customers in the Ligonier store. Out of the Seven Hundred (700) surveys sent specifically to customers of the Ligonier store, fifty-four (54) customers responded and about one-third ( $1/3^{\text{rd}}$ ) of the Ligonier customers (specifically, twenty-eight percent (28%)) expressed a desire that GasAmerica sell beer and wine at the Ligonier store. (LB Hearing, Appeal Hearing).

18. The Ligonier store is located in a commercial district and surrounded by businesses with commercial uses. (Appeal Hearing, ATC File).

19. There exists a CVS drug store in Ligonier in close proximity (across the street) to the GasAmerica store in Ligonier that sells groceries and has an ATC permit to sell beer and wine. (Appeal Hearing).

20. There exists a Kroger's grocery store in Ligonier in close proximity (down the street) to the GasAmerica store in Ligonier that sells groceries, and has an ATC permit to sell beer and wine. (Appeal Hearing).

21. In order to compete on an equal footing with other stores and businesses in the Ligonier community that sell groceries and that also are allowed to sell alcoholic beverages, including grocery stores, drugstores and retail stores, the Ligonier GasAmerica store needs an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing).

22. An ATC alcohol permit for GasAmerica to sell beer and wine is available in the town of Ligonier. (LB Hearing, Appeal Hearing, ATC file).

23. Certain individuals appeared at the LB Hearing to remonstrate against the granting of Permit No. DL57-23122 to GasAmerica. (LB Hearing, Appeal Hearing).

24. The remonstrators at the LB Hearing and the Appeal Hearing generally believed there were too many businesses that sold alcohol in the Ligonier area. (LB Hearing, Appeal Hearing).

25. All GasAmerica stores permitted to sell alcohol do not employ teenage cashiers. Rather, the cashiers in all GasAmerica stores that sell beer and wine must be over the age of twenty-one (21) years. (Appeal Hearing).

26. GasAmerica has a “no tolerance policy” which means that any employee who sells tobacco or alcohol to an underage customer will have their employment automatically terminated. (Appeal Hearing).

27. There is no evidence or testimony that the Applicant herein is not qualified to hold the permit applied for, nor is there any reason to deny this permit at this particular location. (LB Hearing, Appeal Hearing, ATC File).

#### **IV. CONCLUSIONS OF LAW**

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.

3. The ATC is commissioned to act upon proper application. *Id.*
4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11(a).
5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a).
6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e).
7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code 4-21.5-3-27(d).
8. GasAmerica, located at 100 East U.S. 6, Ligonier, Indiana 46767, is an applicant for an ATC Type 115 beer and wine permit, Permit No. DL57-23122.
9. The proposed permit premises is not in a residential district as referred to in Ind. Code 7.1-3-19-13 and 905 IAC 1-18-1.
10. The proposed permit premises is more than two hundred feet (200') from a church or school. Ind. Code 7.1-3-21-11.
11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a).
12. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B).

13. GasAmerica has established that the Ligonier store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.

14. GasAmerica is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; Ind. Code 7.1-3-9-10.

15. GasAmerica is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A).

16. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2.

17. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

18. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

19. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

20. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

21. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

22. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

23. There are several stores that offer these services in the area, as well as in close geographic proximity, to the GasAmerica store in Ligonier. (LB Hearing, Appeal Hearing).

24. The Applicant conducted a store-specific survey (“Survey”) in December, 2007. (LB Hearing, Appeal Hearing).

25. Twenty-nine percent (28%) of the customers responding indicated that they would like GasAmerica to sell beer and wine at the Ligonier store. (LB Hearing, Appeal Hearing).

26. There are customers that purchase beer and wine in the GasAmerica stores located in Angola and Auburn that have asked to purchase beer and wine in the GasAmerica store located in Ligonier. (LB Hearing, Appeal Hearing).

27. There are often specific requests by GasAmerica’s customers in the Ligonier store for the sale of beer and wine. (LB Hearing, Appeal Hearing).

28. The Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant’s location. 905 IAC 1-27-4(b).

29. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant’s location.

30. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

31. GasAmerica has submitted substantial evidence that it is qualified to hold an ATC Type 115 beer and wine grocery permit.

32. No evidence has been submitted which would disqualify GasAmerica from holding a Type 115 beer and wine grocery permit at its Ligonier store location.

33. The beer and wine permit at the Ligonier store will not negatively impact other businesses in the neighborhood or community.

34. To deny GasAmerica's application while granting other similarly situated applicants' applications would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Ind. Code 7.1-3-19-11.

35. The Commission denied this application without sufficient evidence that would support a finding that this permit should not be issued.

36. The law is with the Applicant and against the Remonstrators.

37. Because there was no substantial evidence against the issuance of this permit at either the LB Hearing or the Appeal Hearing, for the Hearing Judge to deny this application would not be supported by substantial evidence.

It is therefore ORDERED, ADJUDGED AND DECREED that the evidence adduced at the Appeal Hearing was in favor of the Applicant, and the appeal of GasAmerica Services, Inc. for this Type 115 permit, Permit No. DL57-23122, is granted, and the permit applied for at its Ligonier store location is hereby GRANTED.

DATED: October 28, 2008

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U-Jung Choe, Hearing Judge